

Appendix A

IN THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY,
FLORIDA

CASE NO. CL 03-6006 AI

TRUDY HECHT, and STEPHEN M. FESSLER,
on behalf of themselves and all others similarly situated,
Plaintiff(s),
vs.

T-MOBILE USA, INC.
Defendant(s).

**ORDER ON DEFENDANT'S MOTION TO COMPEL ARBITRATION AND
DISMISS PLAINTIFF'S CLAIMS OR, ALTERNATIVELY, STAY PROCEEDINGS**

THIS CAUSE came before the Court November 1, 2004 on Defendant's Motion to Compel Arbitration and Dismiss Plaintiffs' Claims or, Alternatively, Stay Proceedings, with Plaintiff Trudy Hecht and Paul Donlon, Defendant T-Mobile USA, Inc.'s senior program manager, present and all parties well represented by counsel.

Plaintiffs, Trudy Hecht and Stephen M. Fessler, have filed claims against Defendant, T-Mobile USA, Inc., alleging that T-Mobile provides personal communication services wireless calling plans; that they contracted to purchase these services; and that T-Mobile promulgated deceptive and misleading advertisements and engaged in wrongful business practices in connection with the services. They seek class action certification and damages for breach of contract, violation of the Florida Deceptive and Unfair Trade Practices Act, and unjust enrichment and a declaration that the arbitration provisions are unenforceable on behalf of class members.

On July 28, 2000, Hecht signed two written contracts for wireless service with T-Mobile's predecessor. Immediately above her signature it stated in bold, albeit small, print:

Disputes are subject to mandatory arbitration pursuant to
paragraph 19. See Reverse.

Paragraph 19 on the reverse side provided:

19. Mandatory Arbitration. Any controversy, claim, or dispute between you and Company arising under this Agreement excluding actions by Company to collect unpaid charges shall be submitted to final, binding arbitration under the auspices of the American Arbitration Association ("AAA") pursuant to its published Wireless Industry Association Rules, incorporated herein by this reference and available by calling the AAA at 800-778-7879 or by visiting its web site at <http://www.adr.org>. Notice of an arbitration commenced by you shall be served on the Company's registered agent. All claims shall be arbitrated individually and you agree that no person shall bring a punitive or certified class action to arbitration or seek to consolidate or bring previously consolidated claims in arbitration. The arbitrator shall have no authority to award punitive damages. **YOU ACKNOWLEDGE THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.**

On May 22, 2003, Hecht entered into three other contracts for telephone services all of which contained agreements to arbitrate. Those agreements provided directly above Hecht's signature:

Disputes are subject to mandatory arbitration in accordance with paragraph 3 on the reverse.

Paragraph 3 on the reverse provided for mandatory arbitration of claims; prohibited an award of lost profits, punitive, incidental or consequential damages; required the parties to split arbitration costs but limited Hecht's costs to \$25.00 on a claim of less than \$1,000 and agreed to pay all administrative costs on claims of less than \$25.00; prohibited Hecht from seeking to consolidate any claims with those of third parties; and required each party in arbitration to pay its own counsel, witnesses, and experts' fees and costs.

Fessler ordered his cellular telephone service over the telephone. T-Mobile shipped him a wireless phone in a sealed box. The outside of the box stated

By activating/using service . . . you acknowledge that you have read through the Terms and Conditions of the Service Agreement which are found in this box.

The box logically could be opened only by raising its flap. In order to raise the flap Fessler had to break open a seal used to seal the box at the flap which stated:

IMPORTANT: Read the enclosed . . . Term & Conditions. By using [T-Mobile] Service, you agree to be bound by the Terms & Conditions, including the mandatory arbitration and early termination fee provisions.

The box included a Welcome Guide which stated:

Important Note: By activating service, you acknowledge that you have read and agree to the terms and conditions of the Service Agreement which are found, enclosed in this box.

The enclosed terms and conditions contain a mandatory arbitration provision providing that

ANY CONTROVERSY, CLAIM OR DISPUTE
BETWEEN YOU AND ARISING UNDER OR IN ANY
WAY RELATED TO OR CONCERNING THIS
AGREEMENT, AND/OR OUR PROVISION TO YOU
OF GOODS, SERVICES, OR UNITS SHALL BE
SUBMITTED TO FINAL, BINDING, ARBITRATION
UNDER THE AUSPICES OF THE AMERICAN
ARBITRATION ASSOCIATION ("AAA") PURSUANT
TO ITS PUBLISHED WIRELESS INDUSTRY
ARBITRATION RULES . . .

Fessler activated his wireless service. Though he terminated the service without penalty within 72 hours, he shortly thereafter voluntarily reactivated the service.

Hecht testified that she is a college graduate; that she was not pressured into entering into the contracts; and that the T-Mobile representative answered all her questions.

Fessler did not testify. Consequently, there is no evidence before the Court of his age, intelligence, or sophistication. Indeed, there is no evidence he was unaware of the

arbitration clause.

The parties stipulated that the claims brought here fall within the purview of the quoted arbitration provisions. Hecht and Fessler do not contend that T-Mobile waived the arbitration provisions. Instead, they contend the provisions are unconscionable and hence unenforceable.


The arbitration clauses here are subject to the Federal Arbitration Act. Powertel, Inc., v. Bexley, 43 So. 2d 570 (Fla. 1st DCA 1999), rev. den. 763 So. 2d 1044 (Fla. 2000). Consequently, their validity is subject to state contract law. 9 U.S.C. §2. Powertel. To establish his or her agreement is unconscionable, the complaining Plaintiff must establish that the agreement to arbitrate both procedurally and substantively unconscionable. Steward Agency, Inc. v. Robinson, 80 So. 2d 726 (Fla. 4th DCA 2003). This makes sense: in general, the law recognizes the rights of private parties to control commercial relations by contract. A contract provision should be voided, then, only if both its substance and the manner in which it was caused to be included "shock the conscience." See Belcher v. Kier, 80 So. 2d 1039 (Fla. 2d DCA 1990), rev. den. 570 So. 2d 305 (Fla. 1990). A surprising but not otherwise illegal term should be excluded only where there is evidence its inclusion was the subject of artifice or force.

Based on the evidence presented, the Court concludes that both Plaintiffs were offered meaningful opportunities to read their contracts that the placement of the arbitration provisions terms and prompts would have fairly placed Plaintiffs on notice of their existence had they chosen to read the contracts and that Plaintiffs could have avoided the arbitration provisions by choosing to contract for cellular telephone services with another provider or not contracting for such services at all. Consequently, Hecht and Fessler's arbitration agreements were not the product of procedural unconscionability. See Gainesville Health Care Center, Inc. v. Weston, 857 So. 2d 278 (Fla. 1st DCA 2003). Consequently, the arbitration provisions are enforceable. Cf. BellSouth Mobility LLC v. Christopher, 819 So.

2d 171 (Fla. 4th DCA 2002). Based on the foregoing, it is

ORDERED AND ADJUDGED that the Motion is Granted, in part. These proceedings are stayed until further Court order, to permit Plaintiffs to pursue their claims through arbitration.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this 10th day of November, 2004.


ELIZABETH T. MAASS
Circuit Court Judge

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